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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE, Plaintiff and Respondent, v. WILLIAM MORGAN, Defendant and Appellant.	B287197 (Los Angeles County Super. Ct. No. BA453233)

APPEAL from a judgment of the Superior Court of Los Angeles County, Terry A. Bork, Judge. Reversed in part, remanded with directions.

Stanley Dale Radtke, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, David Madeo and Nancy Lii Ladner, Deputy Attorneys General, for Plaintiff and Respondent.

I. INTRODUCTION

Following his altercation with an Uber driver, a jury found defendant William Morgan guilty of robbery. On appeal, defendant contends his conviction should be reversed to afford him a hearing under recently enacted Penal Code section 1001.36,[1] which provides criminal defendants suffering from specified mental disorders an opportunity to enter a mental health diversion program in lieu of trial. Defendant further contends that the trial court erred by denying his *Batson/Wheeler* motion,[2] abused its discretion by unreasonably limiting his trial counsel's voir dire of the initial 25 jurors to 15 minutes, and erred by failing to instruct the jury sua sponte on the lesser included offense of assault.

We hold that section 1001.36 applies retroactively to defendant's case and entitles him to a hearing to determine his eligibility for a mental health diversion program. We further hold that substantial evidence supports the trial court's denial of

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1 All further statutory references are to the Penal Code.

2 *Batson/Wheeler* refers to the United States and California Supreme Court decisions in *Batson v. Kentucky* (1986) 476 U.S. 79 (*Batson*) and *People v. Wheeler* (1978) 22 Cal.3d 258 (*Wheeler*). "An objection under *Batson-Wheeler* is in effect a motion to require explanations from the prosecution for each suspect challenge" to ensure that the prosecution does not exclude members of an identifiable group of citizens on racial grounds in violation of either the equal protection clause (*Batson*, *supra*, 476 U.S. at p. 89) or defendant's right to trial by jury under the California Constitution (*Wheeler*, *supra*, 22 Cal.3d at p. 280). (*People v. Phillips* (2007) 147 Cal.App.4th 810, 814-815.)

defendant's *Batson/Wheeler* motion; defendant forfeited his challenge to the trial court's limitation on voir dire; and the court did not have a sua sponte duty to instruct on assault as a lesser included offense of robbery.

II. FACTUAL BACKGROUND

On December 21, 2016, at approximately 5:00 p.m., Rebecca Rodriguez, an Uber driver, received on her cell phone a request to pick up a customer. She picked up the customer, defendant, and started driving on the route indicated on her phone. At the outset of the trip, defendant told Rodriguez he wanted her to take him "to get some food" and then bring him back. When Rodriguez informed defendant that he needed to request the return trip through Uber on his cell phone, defendant told her he did not have his cell phone and complained, "[o]ther drivers do it; so why . . . can't you do it?" Rodriguez explained that Uber would not pay her for the return trip unless defendant made a separate request for that trip on his cell phone. Defendant began cursing at Rodriguez: "What? What the fuck. You don't want to take me back? Bring me back. Other drivers do it; so what is your fucking problem, bitch?" Defendant continued to yell and curse at Rodriguez, and also threatened to provide a negative review about her on Uber.

Not far from where Rodriguez picked up defendant, she pulled over and told him "to get out of [her] car." Immediately after Rodriguez pulled over, defendant "reached to [her] cell phone . . . [in the holder] on the dashboard and got out of the car [with her phone]." Rodriguez turned off her car, grabbed her keys, and went after defendant to retrieve her cell phone. She

followed defendant, demanding he return her phone, but "he just kept walking." Defendant was holding Rodriguez's phone in his left hand as she approached him from behind. When Rodriguez "tried to reach . . . for [her] phone," defendant turned around and punched her in the face, cutting her left cheek and causing it to bleed. Rodriguez was "in shock" as she watched defendant walk away and then throw her phone to the ground. Rodriguez picked up her phone and "put it together."[3]

A passing driver got out of his car, told Rodriguez he had witnessed the incident, and advised her to call 911. Rodriguez called 911 and reported the incident, after which paramedics arrived and treated the cut on her cheek.

III. PROCEDURAL BACKGROUND

The Los Angeles County District Attorney filed an information charging defendant with second degree robbery in violation of section 211. Following trial, the jury found defendant guilty. At the sentencing hearing, the trial court suspended imposition of sentence and placed defendant on formal probation for a period of three years under specified terms and conditions.

IV. DISCUSSION

A. *Pretrial Diversion Hearing*

Defendant contends that he is entitled to a pretrial hearing on diversion under recently enacted section 1001.36 because the

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[3] The phone's protective case and camera lens had been damaged by the impact with the ground.

Legislature intended the statute to apply to cases pending on appeal. As defendant notes, the record includes a psychological evaluation, which states that defendant was prescribed psychotropic medications while in custody, had a history of depression, and had made one suicide attempt. The Attorney General counters that the language of subdivision (c) of section 1001.36 demonstrates that the Legislature intended the enactment to operate prospectively, i.e., the enactment would not apply to cases such as this one in which there has already been an adjudication.

1. Section 1001.36

"Effective June 27, 2018, the Legislature created a diversion program for defendants with diagnosed and qualifying mental disorders such as schizophrenia, bipolar disorder, and posttraumatic stress disorder. (§ 1001.36, subd. (a).) One of the stated purposes of the legislation was to promote '[i]ncreased diversion of individuals with mental disorders . . . while protecting public safety.' (§ 1001.35, subd. (a).) 'As used in this chapter, "pretrial diversion" means the postponement of prosecution, either temporarily or permanently, at any point in the judicial process from the point at which the accused is charged until adjudication . . . .' (§ 1001.36, subd. (c).)

"'On an accusatory pleading alleging the commission of a misdemeanor or felony offense, the court may, after considering the positions of the defense and prosecution, grant pretrial diversion . . . if the defendant meets all of the requirements . . . .' (§ 1001.36, subd. (b).) There are six requirements . . . [including that] the court must . . . be 'satisfied that the defendant's mental

disorder played a significant role in the commission of the charged offense[]'. . . [a]nd . . . 'that the defendant will not pose an unreasonable risk of danger to public safety . . . if treated in the community.' . . .

"If a trial court determines that a defendant meets the six requirements, then the court must also determine whether 'the recommended inpatient or outpatient program of mental health treatment will meet the specialized mental health treatment needs of the defendant.' (§ 1001.36, subd. (c)(1)(A).) The court may then grant diversion and refer the defendant to an approved treatment program. (§ 1001.36, subd. (c)(1)(B).) . . . 'The period during which criminal proceedings against the defendant may be diverted shall be no longer than two years.' (§ 1001.36, subd. (c)(3).)

"If the defendant commits additional crimes, or otherwise performs unsatisfactorily in diversion, then the court may reinstate criminal proceedings. (§ 1001.36, subd. (d).) However, if the defendant performs 'satisfactorily in diversion, at the end of the period of diversion, the court shall dismiss the defendant's criminal charges that were the subject of the criminal proceedings.' (§ 1001.36, subd. (e).)" (*People v. Frahs* (2018) 27 Cal.App.5th 784, 789-790 (*Frahs*), fn. omitted (review granted in S248105 (December 27, 2018)).)[4]

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[4] See Cal. Rules of Court, rule 8.115(e)(1) ["Pending review and filing of the Supreme Court's opinion, unless otherwise ordered by the Supreme Court . . . , a published opinion of a Court of Appeal in the matter has no binding or precedential effect, and may be cited for potentially persuasive value only"].

2. Retroactivity

Pursuant to section 3, newly enacted sections of the Penal Code are presumed to operate prospectively. "No part of the Penal Code 'is retroactive, unless expressly so declared.' (§ 3.) '[T]he language of section 3 erects a strong presumption of prospective operation, codifying the principle that, "in the absence of an express retroactivity provision, a statute will not be applied retroactively unless it is very clear from extrinsic sources that the [lawmakers] . . . must have intended a retroactive application." [Citations.] Accordingly, "'a statute that is ambiguous with respect to retroactive application is construed . . . to be unambiguously prospective.'"'" (*People v. Buycks* (2018) 5 Cal.5th 857, 880.)

If, however, a new section of the Penal Code has the effect of mitigating or ameliorating punishment, courts must "presume that [such] newly enacted legislation . . . reflects a determination that the 'former penalty was too severe' and that the ameliorative changes [to the statute] are intended to 'apply to every case to which it constitutionally could apply,' which would include those 'acts committed before its passage[,] provided the judgment convicting the defendant of the act is not final.' ([*In re*] *Estrada* [(1965)] 63 Cal.2d [740,] 745 [(*Estrada*)].) The *Estrada* rule rests on the presumption that, in the absence of a savings clause providing only prospective relief or other clear intention concerning any retroactive effect, 'a legislative body ordinarily intends for ameliorative changes to the criminal law to extend as broadly as possible, distinguishing only as necessary between sentences that are final and sentences that are not.' (*People v. Conley* (2016) 63 Cal.4th 646, 657, . . . , citing *Estrada*, [*supra*, 63

Cal.2d] at p. 745.)" (*People v. Buycks, supra*, 5 Cal.5th at pp. 881-882.)

3. Analysis

In his supplemental opening brief, defendant contends that he is entitled to reversal to afford him a diversion hearing under section 1001.36. Citing *People v. Superior Court* (*Lara*) (2018) 4 Cal.5th 299 (*Lara*) and the retroactivity rule discussed above in *Estrada*, *supra*, 63 Cal.2d 740, defendant reasons that section 1001.36 provides an ameliorative benefit to a class of defendants whose mental illness contributed to the commission of their offenses. Defendant therefore concludes that the *Estrada* rule requires application of section 1001.36 to his case because the judgment against him is not yet final.

The Attorney General disagrees, arguing that subdivision (c) expressly limits the application of section 1001.36 to cases in which there can be a postponement of prosecution prior to "adjudication." Once a criminal proceeding has been adjudicated, however, the Attorney General reasons that postponement for diversion is no longer available under the plain language of the enactment.

Defendant cites the recent decision in *Frahs*, *supra*, 27 Cal.App.5th 784 in support. In *Frahs*, a jury found defendant guilty on two counts of robbery. (*Id.* at p. 786.) While the defendant's case was pending on appeal, the Legislature enacted section 1001.36. (*Id*. at p. 787.) On appeal, the defendant contended, among other things, that the mental health diversion program available under section 1001.36 should apply retroactively. (*Id*. at p. 788.)

The court in *Frahs*, *supra*, 27 Cal.App.5th 784 agreed with the defendant and conditionally reversed his conviction and sentence. (*Id*. at pp. 787, 791-793.) In doing so, the court in *Frahs* applied the retroactivity rationale articulated in *Estrada*, *supra*, 63 Cal.2d 740 and expressly rejected an argument similar to the Attorney General's in this case, reasoning as follows: "Applying the reasoning of the Supreme Court, we infer that the Legislature 'must have intended' that the potential 'ameliorating benefits' of mental health diversion to 'apply to every case to which it constitutionally could apply.' ([See] *Estrada, supra*, 63 Cal.2d at pp. 744-746.) Further, [the defendant's] case is not yet final on appeal and the record affirmatively discloses that he appears to meet at least one of the threshold requirements (a diagnosed mental disorder). Therefore, we will direct the trial court on remand to make an eligibility determination regarding diversion under section 1001.36. [¶] The Attorney General argues that: 'Subdivision (c) of the statute defines "pretrial diversion" as the "postponement [of] prosecution, either temporarily or permanently, at any point in the judicial process from the point at which the accused is charged until adjudication." This language indicates the Legislature did not intend to extend the potential benefits of . . . section 1001.36' as broadly as possible. We disagree. The fact that mental health diversion is available only up until the time that a defendant's case is 'adjudicated' is simply how this particular diversion program is ordinarily designed to operate. Indeed, the fact that a juvenile transfer hearing under Proposition 57 ordinarily occurs prior to the attachment of jeopardy, did not prevent the Supreme Court in *Lara, supra*, 4 Cal.5th 299, from finding that such a hearing must be made available to all defendants whose

convictions are not yet final on appeal. [¶] Here, although [the defendant's] case has technically been 'adjudicated' in the trial court, his case is not yet final on appeal. Thus, we will instruct the trial court—as nearly as possible—to retroactively apply the provisions of section 1001.36, as though the statute existed at the time [the defendant] was initially charged." (*Frahs*, *supra*, 27 Cal.App.5th at p. 791.)

We are persuaded by the reasoning in *Frahs* that the rule in *Estrada*, *supra*, 63 Cal.2d 740 requires retroactive application of section 1001.36. Although the language of subdivision (c) of section 1001.36 defines "pretrial diversion" as a postponement of prosecution at any point from the accusation through adjudication, that language does not suggest that the Legislature intended that the ameliorative benefits of section 1001.36 would not be available in cases, such as this one, where there has been a technical adjudication, but the conviction is not yet final on appeal. As the court in *Estrada* explained, the ameliorative benefits of a new criminal statute such as section 1001.36 should be made available to all eligible criminal defendants whose convictions are not yet final on appeal. (*Estrada*, *supra*, 63 Cal.2d at p. 745.)

B. *Ruling on Batson/Wheeler Motion*

Defendant next argues that the trial court erred by denying the *Batson/Wheeler* motion he made after the prosecutor used a peremptory challenge to excuse an African-American prospective juror. According to defendant, the prosecutor's proffered explanation for the challenge was merely pretext for discrimination.

1. Background

During the trial court's voir dire, prospective juror number 25 provided the following information about his son's criminal background: "[M]y son [served] 25 years for attempted murder. [H]e was incarcerated [for 13 years, served] 10 years probation . . . , and [has] been clean ever since. [¶] . . . [¶] This happened in Beaumont, Texas. He did his time in Texas, and he finished probation in 2013."

When the trial court asked juror number 25 if he thought the case had been handled in an unfair or fair manner, juror number 25 responded: "In a sense because he wasn't actually participating [in the attempted murder]. He was there. And I think [in] the state of Texas, even if you [are] just there, you [are] part of the problem, [part of] the crime. And it was his first offense, and he got 23 years . . . , and he [served] 13 and [spent] ten years [on] probation without any problems. So, . . . my philosophy [is], if you do the crime, you do the time. So it's up to him. He learned his lesson. [He d]idn't cause [any] problems in prison while he was locked up. That was it." Juror number 25 also stated that his pastor's daughter was a lieutenant in the Los Angeles Police Department. Following further colloquy with the trial court, juror number 25 stated that he could give both sides a fair trial.

Later during the jury selection process, the prosecutor sought to exercise a peremptory challenge to juror number 25, but defense counsel objected. During subsequent proceedings outside the presence of the jury, the trial court and counsel engaged in the following exchange: "[The Court]: So let's take up the [*Batson/Wheeler*] challenge made by the defense involving

prospective juror number 25. I'll undertake the question of whether a prima facie case has been shown. [¶] Defense, why don't you state the basis for your motion, please. [¶] [Defense Counsel]: Your [h]onor, juror [number] 25 appears to be the sole African[-]American of the 35-pack. My client is African[-]American. . . . I really don't know what the basis would be . . . for him being excused. I'm not sure if I recall any sort of interaction between him and the prosecutor in terms of him saying he couldn't be fair. That's my basis, your [h]onor. I know he talked about his son. He certainly was very much about do a crime, you do the time and indicated he would be fair. When I questioned him, it seemed like he was able to be a fair juror. So that's my basis, your [h]onor. [¶] [The Court]: All right. People, please respond now only to the issue of whether a prima facie case has been established. [¶] [Prosecutor]: Your [h]onor, I don't believe a prima facie case has been established."

After noting that juror number 3 may also have been African-American, the trial court indicated that it appeared a prima facie case had been made "for purposes of the *Batson Wheeler* challenge." The court then took a recess, noting that it would complete the hearing on the *Batson/Wheeler* challenge the following morning.

The next morning, the trial court ruled that: "Based on the totality of the circumstances, I find that the moving party has established an inference that juror number 25 was challenged because of his group association, and I make that finding based upon the fact that he . . . is a member of . . . that particular group, African[-]American; that the named victim . . . has a Hispanic surname, although I don't know enough about the facts to know that there is a racial overtone to the incident itself. . . . [¶] And

further that juror number 25 appeared to this court to be a thoughtful, serious-minded gentleman who indicated to this court, pursuant to questioning, that he was committed to being fair even despite his relationship with a high level L.A.P.D. officer and even despite the fact that his own son had been arrested and convicted in the State of Texas on a case where he was of the opinion that the evidence was insufficient for a conviction and his son was later sentenced to 25 years in prison. Notwithstanding those experiences, he had indicated to the court that he felt that he could be fair to both sides in this case. [¶] That's the court's reasons for finding that the prima facie case has been met."

In response to the trial court's request for an explanation of why he exercised a peremptory challenge to prospective juror number 25, the prosecutor explained: "Juror number 25, in my estimation, was a for-cause challenge that I chose not to [make,] and the reason I say that is because . . . his son did . . . 23 to 25 years on an attempted murder. When asked if he felt his son was treated fairly, he said no. He was just there. He was at the place. He didn't actually commit the crime in his estimation. It's just that's the way Texas law is. That's essentially what he said. [¶] Now, anybody with that type of negative experience of law enforcement, who thinks their son was either incorrectly charged with a very serious offense—and here we have a serious offense, a [violation of section] 211[, and] there we had an attempted murder. Those are both serious offenses. Anybody who has someone that close to them who was put in prison that they feel unjustly for that length of time is in my estimation not going to be a fair juror to the [P]eople. [¶] Now, the reason why I didn't exercise a for-cause challenge on him was because he did say to

defense counsel he thought he could be fair. I don't believe, . . . even if he has the best intentions, that that's not going to play a role in how he thinks about another serious offense if he's a juror. [¶] Now, I'd like to point to jurors number 11 and . . . number 15. These are people that under similar circumstances I asked to be [excused] for cause. If the judge didn't grant that, I was going to use my peremptory on them. And the reason why is because juror number 11 had a sister who went to prison, and he feels it was unjust. And that alone . . . [is sufficient] to get me to [excuse] you [from] my jury. [¶] Now, . . . [juror number] 15 was a Hispanic woman who[se] . . . son had a pending criminal matter, and she felt . . . he was perhaps being treated unfairly. She was going to be attending the trial next week. [Juror numbers] 11 and 15 . . . both said that they weren't sure if they could be fair. I asked for the court to [excuse] them for cause, and the court agreed with me. [¶] So . . . I'm not showing that I'm attacking any particular race or gender. What I'm showing is that, if [a prospective juror] has somebody close to them who [in their estimation] has been unfairly treated, . . . and who has been placed in prison or has a pending jail sentence, then I'm going to [excuse] them."

Following further argument from both defense counsel and the prosecutor, the trial court ruled as follows: "I find, upon reflection and [in] view of the totality of circumstances, that the reasons given for the challenge of juror number 25 by the district attorney are group neutral. I do think the D.A. has a point that, when somebody has had a very close relative—in this case, a son—who has been arrested, charged, tried and convicted and sentenced to . . . 23 years in prison in Texas, and who at the same time felt that process was unfair, frankly, most people

experiencing that would have a difficult time giving a prosecutor an open-minded hearing because it is so close and so personal. [¶] And so I find that would be a plausible group neutral explanation. . . . I do believe that our record does show as well that the D.A. did question juror number 25 and that there was a probing in those questions at least to a point by the district attorney on the issue of whether he was biased.[5] [¶] I also know nothing else is apparent to this court in the [prosecutor's] demeanor or manner [during] voir dire that suggests a group bias. I also think the [prosecutor's] point about [juror] number 25 being somewhat similarly situated with . . . former jurors 11 and 15 is . . . somewhat probative on this point as well. [¶] So I find the explanations group neutral and plausible. And therefore the moving party's motion under [*Batson/Wheeler*] is considered but in its totality is respectfully denied."

2. Legal Principles

"The three-stage procedure of a *Batson/Wheeler* motion is now familiar. 'First, the defendant must make out a prima facie case "by showing that the totality of the relevant facts gives rise to an inference of discriminatory purpose." [Citations.] Second, once the defendant has made out a prima facie case, the "burden shifts to the State to explain adequately the racial exclusion" by offering permissible race-neutral justifications for the strikes. [Citations.] Third, "[i]f a race-neutral explanation is tendered,

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5 The prosecutor did not ask any specific questions of juror number 25 and thus the trial court's recollection was incorrect. This, however, does not change our conclusion, below, that the trial court's ruling was supported by substantial evidence.

the trial court must then decide . . . whether the opponent of the strike has proved purposeful racial discrimination.'" (*Johnson v. California* (2005) 545 U.S. 162, 168 . . . fn. omitted.) [¶] . . . 'Review of a trial court's denial of a *Wheeler*/*Batson* motion is deferential, examining only whether substantial evidence supports its conclusions.' (*People v. Lenix* (2008) 44 Cal.4th 602, 613 . . . .) 'We presume that a prosecutor uses peremptory challenges in a constitutional manner and give great deference to the trial court's ability to distinguish bona fide reasons from sham excuses.' (*People v. Burgener* (2003) 29 Cal.4th 833, 864 . . . .) As long as the court 'makes a sincere and reasoned effort to evaluate the nondiscriminatory justifications offered, its conclusions are entitled to deference on appeal.' (*Ibid.*)" (*People v. Williams* (2013) 56 Cal.4th 630, 649-650.)

3. Analysis

Defendant contends that the trial court failed to engage in any "fact finding" relating to the prosecutor's explanations for excusing prospective juror number 25. According to defendant, the trial court therefore failed to engage in a sincere and reasoned effort to evaluate the prosecutor's stated reasons for exercising a peremptory challenge to that juror.

Contrary to defendant's assertion, the record contains evidentiary support for the trial court's conclusion that the prosecutor's stated reasons for exercising the challenge were race-neutral and plausible. Prospective juror number 25 stated that his son spent 13 years in a Texas prison and another 10 years on probation for merely being present at a crime. In other words, juror number 25 believed that his son had served a 23

year sentence for a crime that he did not commit. That statement supported a reasonable inference that juror number 25 may not have been able to overcome his negative impression of his son's experience with the criminal justice system and provide the prosecutor a fair and unbiased hearing on the merits. (See *People v. Reed* (2018) 4 Cal.5th 989, 1001 ["We have previously recognized a relative's negative experiences with law enforcement as a race-neutral hypothetical reason for a strike that dispels any inference of discriminatory intent" (citing *People v. Harris* (2013) 57 Cal.4th 804, 836)]; see also *People v. Hardy* (2018) 5 Cal.5th 56, 82 ["'A "negative experience with law enforcement" is a valid basis for a peremptory challenge.' (*People v. Melendez* (2016) 2 Cal.5th [1,] 18)"].)

In addition, the prosecutor made successful for-cause challenges to juror numbers 11 and 15, who were not African-American, for similar reasons, i.e., like juror number 25, they each had close family members that they believed had not been treated fairly or justly by the criminal justice system. That the prosecutor sought to excuse these jurors supported an inference that he had a race-neutral and plausible basis for excusing jurors with similar negative experiences with the criminal justice system.

Under the controlling substantial evidence standard, we must defer to the trial court's determinations concerning the prosecutor's explanations if they are supported by the evidence. Here, the record reflects the requisite factual basis to support the trial court's determinations.

C. *Limitation on Voir Dire*

Defendant also asserts that the trial court abused its discretion when it limited his trial counsel's voir dire of the first 25 prospective jurors to just 15 minutes. As defendant views the record, the trial court's restriction—which amounted to 36 seconds per juror questioned—was arbitrary and denied him his right to a fair and impartial jury.

1. Background

At the beginning of jury selection, the trial court explained how it intended to conduct the jury selection process for the first panel of 35 prospective jurors: "The way we choose juries in this courtroom . . . , with out-of-custody defendants, is what I would call, for want of a better term, a 25-pack. . . . [¶] So jurors 1 through 25 will be seated in order, 12 in the box and then [the remaining 13] in the blue chairs in front of the box and behind you in front of the partition. [¶] I will do a judicial voir dire using the one-page questionnaire. . . . And then you will have the opportunity for attorney voir dire. For the first 25 jurors, I'll give you 15 minutes each to ask questions of those 25, and obviously you can cover whatever you want that's appropriate. And you will see that my voir dire goes over pretty basic issues like where they live and if they've ever been on jury duty before and things of that nature. [¶] If there's special issues you want me to go over, I'm willing to do that. Just let me know what they are. I'll go over burden of proof, defendant's right to remain silent, presumption of innocence, legal issues like that. If you want me to cover those, let me know and I'll do that. [¶] Other than that,

whatever I don't cover, it's your obligation to cover. You know the case. There's unique factual and legal issues in the case, and you can cover that in your own voir dire of the jurors." Defendant's trial counsel did not voice any objection or request additional time.

Thereafter, the trial court questioned the 25 potential jurors, and defense counsel then questioned those jurors for his allotted 15 minutes. Once again, defendant's counsel did not object to the 15-minute limitation or request more time, either before or after his questioning.

Jury selection then proceeded without objection.[6] The trial court then swore in 12 jurors from the original panel of 35 prospective jurors; but at that point, the number of prospective jurors available from that panel had been exhausted.

The trial court then swore in a new panel of 20 additional prospective jurors from which the two alternates were to be selected. Toward the end of the alternate-selection process, the trial court denied defendant's for-cause challenge to prospective alternate juror number 39. The trial court and defense counsel then engaged in the following exchange: "[The Court]: [As to juror number 39,] [s]he seemed a little confused when she was questioned by [defense counsel], and the questions to her and others were quite direct. It's sometimes hard for people without a

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[6] During the questioning of the last seven prospective jurors in the original panel of 35, the trial court indicated it would allow counsel three minutes per side to question those prospective jurors following the court's own questioning of them. Defense counsel responded by requesting 10 minutes, and the trial court compromised by granting him four minutes. This exchange occurred after defense counsel had already questioned the first 25 jurors for 15 minutes.

legal background to be able to answer. But looking at her answers in their totality, I think she is very much able to be open-minded and fair to both sides and [to be] impartial. So [the for-cause challenge is] denied as to her. [¶] . . . [¶] [Defense Counsel]: Your Honor, given the court's limited time on voir dire, I am not able to explore these jurors. When they give these wavering answers, I kind of just have to accept it and move on. Otherwise, I [will] use all my time on these little issues. I wish the court would give us more time when we come across maybe potential problem jurors to explore and address these issues. [¶] [The Court]: I respectfully disagree with you as to the point, at least as to the way it has worked out with this panel today. So the objection is noted and considered but is overruled."

Defense counsel thereafter used his last peremptory challenge to excuse prospective alternate juror number 39, at which point the two alternates were sworn and the jury selection process was concluded.

2. Legal Principles

"There is no constitutional right to voir dire per se. Nor is there any constitutional right to conduct voir dire in a particular manner. (*People v. Robinson* (2005) 37 Cal.4th 592, 613 . . . .) Rather, the voir dire process serves as a means of implementing the defendant's Sixth Amendment right to an impartial jury. (*Ibid.*; accord, *People v. Fuiava* (2012) 53 Cal.4th 622, 654 . . . (*Fuiava*).) [¶] Consistent with applicable statutory law, the trial court has wide latitude to decide the questions to be asked on voir dire (*People v. Rogers* (2009) 46 Cal.4th 1136, 1149 . . .), and to select the format in which such questioning occurs (see [*People v.*]

Stitely [(2005)] 35 Cal.4th 514, 536-539). The court likewise has broad discretion to contain voir dire within reasonable limits. (*People v. Zambrano* (2007) 41 Cal.4th 1082, 1120 . . . .) Unless the voir dire 'is so inadequate that the reviewing court can say that the resulting trial was fundamentally unfair, the manner in which voir dire is conducted is not a basis for reversal.' (*People v. Holt* (1997) 15 Cal.4th 619, 661 . . . ; accord, *Fuiava, supra*, 53 Cal.4th 622, 654; *People v. Bolden* (2002) 29 Cal.4th 515, 538 . . . .)" (*People v. Contreras* (2013) 58 Cal.4th 123, 143, fn. omitted.)

3. Forfeiture

The Attorney General contends that defendant forfeited his challenge to the trial court's 15 minute limitation on his trial counsel's questioning of the first 25 prospective jurors. According to the Attorney General, by not objecting to the 15 minute limitation *at the time that limitation was imposed*, defendant forfeited his challenge to it on appeal.

"Ordinarily, a criminal defendant who does not challenge an assertedly erroneous ruling of the trial court in that court has forfeited his or her right to raise the claim on appeal. [Citations.] As the United States Supreme Court recognized in *United States v. Olano* [1993] 507 U.S. [725,] 731, "'[n]o procedural principle is more familiar to this Court than that a constitutional right," or a right of any other sort, "may be forfeited in criminal as well as civil cases by the failure to make timely assertion of the right before a tribunal having jurisdiction to determine it.'" [Citations.] 'The purpose of this rule is to encourage parties to bring errors to the attention of the trial court, so that they may

be corrected. [Citation.]'" (*In re Sheena K.* (2007) 40 Cal.4th 875, 880-881.)

In response to the forfeiture issue, defendant asserts that his trial counsel made a timely objection which the trial court considered and ruled upon. He supports this assertion by pointing to his trial counsel's objection after the trial court denied counsel's for-cause challenge to prospective alternate juror number 39. According to defendant, that objection—made at the end of voir dire after 12 jurors had been sworn and during the selection of the two alternates—was sufficient to allow the trial court to consider and rule upon the issue he now raises on appeal: whether the original 15-minute limitation on his trial counsel's questioning of the initial 25 prospective jurors was arbitrary and prejudicial.

Based on the timing and circumstances of defense counsel's objection, we conclude it was not sufficient to preserve on appeal defendant's challenge to the 15-minute limitation on his counsel's voir dire. The trial court's limitation was announced prior to the beginning of voir dire without any objection from defendant's trial counsel. The trial court then presided over the voir dire of the first 25 prospective jurors, under the assumption that the 15-minute limitation on counsel's voir dire was acceptable. When defense counsel's opportunity to question those jurors arrived, he did not object or request more time, but rather proceeded to question the jurors within the constraints of the 15-minute time period. Moreover, when 12 jurors were selected from the original panel of 35, defense counsel did not object to them being sworn based on the 15-minute limitation or any other ground. Instead, defense counsel accepted the 12-member panel and proceeded to question prospective alternates under a different time-limitation,

but then did not object until after his for-cause challenge to juror number 39 was denied. And, following that denial and objection, defense counsel exercised his last peremptory challenge to excuse juror number 39, and thereafter allowed the two alternates to be sworn without further objection.

Given the record of the voir dire process, it is clear that defense counsel's objection concerning the time limitation on his questioning of the prospective alternates was untimely and otherwise insufficient to raise with the trial court any legitimate concern about the court's initial 15-minute limitation on defense counsel's questioning of the first 25 jurors. We therefore agree that the issue has been forfeited.

D. *Failure to Instruct on Lesser Included Offense of Assault*[7]

Defendant's final contention is that the trial court erred by not instructing the jury on the lesser included offense of assault. He argues that, under the accusatory pleading test, assault qualified as a lesser included offense of the charged crime of robbery and, therefore, the trial court had a sua sponte duty to instruct on that uncharged offense.

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[7] As the Attorney General points out, defendant's introductory heading to this challenge references the trial court's failure to instruct sua sponte on assault, battery, and theft, but defendant thereafter discusses only the failure to instruct on assault.

1. Background

During the jury instruction conference, the following exchange took place between and among the trial court and counsel regarding instructions on lesser included offenses: "[Defense Counsel]: I was gonna request actually lesser related charges. [¶] [The Court]: Which one? [¶] [Defense Counsel]: Battery and vandalism. [¶] [The Court]: Because your comments in voir dire and opening were . . . [to] examine the charge itself. It seems like the thrust of your defense was . . . [the case] was either misfiled or overfiled, ... And he's done some bad things, but they don't in any event amount to robbery. [¶] [Defense Counsel]: Right. So it's like . . . you may hear evidence of another different crime, but this is a specific charge of robbery. Or you may hear evidence of . . . something you didn't like, but he could be guilty of something else but not robbery. So I submit we have battery. We have a vandalism.

"[The Court]: People, what's your position? [¶] [Prosecutor]: Your [h]onor, . . . I don't believe the court . . . should give any lesser included or lesser related offenses in this case. I did look at the bench notes on the [section] 211, and there's no sua sponte duty to give any lesser with the exception that, . . . when there is evidence that the defendant formed the intent to steal after the application of force or fear, the court has the sua sponte duty to instruct on any relevant lesser included offenses. That is not the case with the facts here. So I would ask we just have the [section] 211 [robbery charge].

"[The Court]: Do you want to respond, [defense counsel]? [¶] [Defense Counsel]: No, your [h]onor. Submitted.

"[The Court]: I'm kind of wondering out loud. I welcome your comments. What if the jury were to accept the defense position that he never formed the intent to permanently deprive? This was . . . [a situation in which] he lost his temper, and he's angry at the driver, and he said some things . . . hotheadedly. And he ends up throwing her telephone on the ground, walked away from it, from the car with the phone in hand but didn't run away. She caught up with him shortly after, getting out of the car, and all of that doesn't amount to the intent to permanently deprive. [¶] If they accept that theory of the case . . . then shouldn't I be giving them . . . a lesser included that does not include that element? And that's probably the closest element, . . . from an evidentiary standpoint in the case, isn't it?

"[Prosecutor]: Your [h]onor, what we're seeking here is a robbery. If . . . after hearing everything . . . the jury decides that the defendant is not guilty of robbery, then . . . he won't be guilty of anything. And . . . we're asking the court to do that for a number of reasons, but the main reason is we don't want to confuse the jury, make this a more cumbersome process than it has to be. There's one count [on which] we're seeking [conviction]. We believe we've proved it up. We'll leave that in the hands of the jury and see what they decide.

"[The Court]: Anything further from the defense? [¶] [Defense Counsel]: Your [h]onor, I agree with the court's reasoning, . . . and that's why I am asking for a battery and a vandalism. [¶] [The Court]: Battery is a lesser related, not a lesser included. [¶] [Defense Counsel]: I understand. [¶] [The Court]: All right. Well, I want to go back and look at the

Supreme Court's *Kelly*[8] case which, number 1, instructs me to consider . . . whether all elements of the charge are present. And I don't know if I have that or not. I want to review my notes. I want to consider the [*Kelly*] case directions to trial courts. [¶] And I also am aware that it's not my job to speculate on the evidence but that, if there are substantial enough lesser[] [offenses] to warrant consideration, I have my own obligation independent of the lawyers to give that instruction. So I'm going to look at my notes, consider that very issue, and then I'll come to a decision."

Thereafter, the trial court instructed the jury on robbery, but not on any lesser included offenses.

After closing arguments, defense counsel again raised the issue of a sua sponte duty to instruct on the purportedly lesser included offense of battery: "Yes, your [h]onor. . . . I believe the court has a sua sponte duty to give this jury a battery instruction. It's a necessary included offense under the accusatory pleading test, given that in this case . . . the alleged robbery occurred through force and fear, which is what's alleged in the pleadings, . . . under [an]— . . . [a]ccusatory pleading test, all the elements of battery are present in the robbery. [¶] In [*People v. Brown* (2016) 245 Cal.App.4th 140 (*Brown*)] the court found that assault was a lesser included offense of a [section] 69. Even though it's not . . . necessar[ily] included . . . under the statutory elements test, the fact that an assault was factually what occurred in terms of the . . . underlying basis for the [section] 69, that the

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8 In *People v. Kelly* (1992) 1 Cal.4th 495, 529-530, the court concluded that based on the facts presented in that case, the trial court had a sua sponte duty to instruct on theft as a lesser included offense of robbery.

court should have instructed on simple assault in that case. [¶] And here, your [h]onor, given that a battery is what's included for the basis of the robbery, the court here has a sua sponte duty to instruct on battery under the accusatory pleading test."

Following further argument by counsel, the trial court concluded as follows: "I thank you both for your comments and for the citation to the [*Brown*] case. I had asked for counsel's input on this question of lesser included offenses early on. Certainly the court does have sua sponte responsibilities. I have considered those. As I discussed earlier on the record, I had considered instructing on the lesser included[] [offenses] but decided against it for the reasons I've spelled out earlier. [¶] I feel that now my analysis wouldn't change. I'm aware, as the [*Brown*] case points out, that where there is substantial evidence that only the lesser included offense was committed, that I must instruct on that. I considered it earlier and decided against it for the reasons given. I think that to change course now is untimely, would be confusing to the jurors. They weren't instructed on it. It wasn't argued in closing arguments. And for those reasons, given the totality of the circumstances, I decline now at this late hour to reconsider this matter and change the ruling that was made previously."

2. Legal Principles

Defendant did not request at trial an instruction on assault. Thus, the trial court was not required to instruct on that offense, unless it was under a sua sponte duty to give such an instruction.

"A trial court has a sua sponte obligation to instruct the jury on any uncharged offense that is lesser than, and included in, a greater charged offense, but only if there is substantial evidence supporting a jury determination that the defendant was in fact guilty only of the lesser offense. [Citations.] An uncharged offense is included in a greater charged offense if *either* (1) the greater offense, as defined by statute, cannot be committed without also committing the lesser (the elements test), *or* (2) the language of the accusatory pleading encompasses all the elements of the lesser offense (the accusatory pleading test). [Citations.] [¶] Under the elements test, a court determines whether, as a matter of law, the statutory definition of the greater offense necessarily includes the lesser offense. A robbery is 'the felonious taking of personal property in the possession of another, from his person or immediate presence, and against his will, accomplished by means of force *or* fear.' (§ 211, italics added.) An assault, however, is 'an unlawful attempt, coupled with a present ability, to commit a violent injury on the person of another.' (§ 240.) Because a robbery can be committed strictly by means of fear, assault is not a lesser included offense of robbery under the elements test. [¶] Under the accusatory pleading test, a court reviews the accusatory pleading to determine whether the facts actually alleged include all of the elements of the uncharged lesser offense; if it does, then the latter is necessarily included in the former." (*People v. Parson* (2008) 44 Cal.4th 332, 348-349 (*Parson*).)[9]

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[9] The court in *Parson, supra*, 44 Cal.4th 332 was presented with argument and authority that assault is not a lesser included offense of robbery, but did not decide the issue before it on that basis. "In response to defendant's claim, the People rely on

3. Analysis

Relying on *People v. Barrick* (1982) 33 Cal.3d 115, superseded by statute or rule as stated in *People v. Collins* (1986) 42 Cal.3d 378, 393, defendant emphasizes that the accusatory pleading in this case charged defendant with robbery by "means of force *and* fear." (Emphasis added.) According to defendant, the use of the conjunctive "and" in the pleading distinguishes this case from those in which defendants are charged strictly under the statutory elements of robbery, which requires a taking by "means of force *or* fear." (§ 211, emphasis added.) Under defendant's construction of the pleading in this case, the robbery charge required evidence of both fear and force. Because force was therefore a necessary element of the crime charged in the pleading, defendant concludes that assault—which also requires a type of force, i.e., an attempt to inflict a violent injury (§ 240)—was a lesser included offense of robbery.

People v. Wright (1996) 52 Cal.App.4th 203 [(*Wright*)], which specifically held an assault is not necessarily included when a pleading alleges a robbery by force and fear. *Wright* reasoned that commission of a robbery by force is possible without necessarily committing an assault because the use of force may be actual or constructive, and may include the use of threat to induce fear, even without an attempt to apply force or the present ability for an assault. ([*Id.*] at pp. 210-211.) [¶] Even assuming that assault is a lesser included offense of robbery as charged here, the trial court was under no sua sponte obligation to instruct on assault if, in any event, there was no substantial evidence supporting a jury determination that the defendant was in fact guilty only of that offense." (*Parson, supra*, 44 Cal.4th at p. 350.)

In response to defendant's assertion, the Attorney General cites *Wright, supra*, 52 Cal.App.4th 203, which held that, even when a defendant is charged with committing robbery by means of force and fear, assault is not a necessarily included offense of robbery. (*Id*. at p. 211.)

In reply, defendant concedes that *Wright*, *supra*, 52 Cal.App.4th 203 "rejected the argument [defendant] is making here." Nevertheless, citing *People v. Tuggle* (1991) 232 Cal.App.3d 147 (*Tuggle*), defendant asserts that *Wright* was wrongly decided.

We agree with the court in *Wright*, *supra*, 52 Cal.App.4th 203 that, even under the accusatory pleading test, assault is not a lesser included offense of robbery. As the court in *Wright* explained, "'force' is not an element of robbery independent of 'fear'; there is an equivalency between the two. "'[T]he coercive effect of fear induced by threats . . . is in itself a form of force, so that either factor may normally be considered as attended by the other.'" [¶] . . . [¶] Since the element of force can be satisfied by evidence of fear, it is possible to commit a robbery by force without necessarily committing an assault. Consequently, under the 'accusatory pleading' test, assault is not necessarily included when the pleading alleges a robbery by force. As a result, the trial court had no duty to instruct sua sponte on assault as a lesser included offense of robbery . . . ." (*Id*. at p. 211.)

Defendant's reliance on the earlier Court of Appeal decision in *Tuggle*, *supra*, 232 Cal.App.3d 147 to support his view that assault is a lesser included offense of the charged robbery is misplaced, as that case did not involve the lesser included offense analysis required here. Instead, *Tuggle* involved the defendant's prior guilty plea to a robbery charge that was allegedly

committed by force *and* fear. Unlike here, the issue decided by the court in *Tuggle* was whether, in a subsequent prosecution of the defendant as a habitual offender under section 667.7, defendant's prior guilty plea to robbery by fear and force was sufficient to satisfy the requirement of section 667.7 that the prior robbery must have been committed by force. (*Id.* at pp. 153-154.) Indeed, the court distinguished "the consequences of a guilty plea to charges enumerating several acts in the conjunctive" from the doctrine of conjunctive pleading,[10] which permits a defendant charged with robbery by means of "force *and* fear," to be convicted based upon evidence that established only one of those acts. (*Id*. at p. 154.)

But the court in *Tuggle, supra*, 232 Cal.App.3d 147 then explained the doctrine of conjunctive pleading had no bearing on the interpretation of the defendant's guilty plea: "That appellant theoretically could have been convicted of robbery by fear but not by force does not negate the effect of his guilty plea. A plea of guilty admits every element of the offense charged [citation], all allegations and factors comprising the charge contained in the pleading. [Citations.] The transcript of [the defendant's] change of plea hearing demonstrates that he pled guilty to the offense of 'violating section 211[], a felony, *as set forth in Count 1 of the information*.' By pleading guilty as charged, [the defendant]

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10 The Supreme Court in *In re Bushman* (1970) 1 Cal.3d 767, 775, explained that, "When a statute . . . lists several acts in the disjunctive, any one of which constitutes an offense, the complaint, in alleging more than one of such acts, should do so in the conjunctive to avoid uncertainty. [Citations.] Merely because the complaint is phrased in the conjunctive, however, does not prevent a trier of fact from convicting a defendant if the evidence proves only one of the alleged acts."

necessarily admitted the force allegation and cannot now escape the consequences of that admission. [Citation.] [¶] We cannot agree with [the defendant's] suggestion that the charge of force 'and' fear was superfluous. Force is not a necessary element of the offense of robbery because the offense may be committed by fear alone. (§ 211.) A defendant may be bound to his or her admission of a charged crime, however, even though some of the allegations in the charging document were not elements of the offense." (*Id*. at pp. 154-155, fn. omitted.)

Because *Tuggle, supra*, 232 Cal.App.3d 147 did not involve the lesser included offense analysis required here, but instead involved the interpretation of a guilty plea for purposes of habitual offender treatment under section 667.7, it does not implicate, much less undermine, the precedential effect of the decision in *Wright*, *supra*, 52 Cal.App.4th 203. We therefore conclude that, under the rationale of *Wright*, assault was not a lesser included offense to the robbery charged in this case. The trial court therefore had no duty to instruct on that offense.

V. DISPOSITION

The judgment is conditionally reversed and the matter is remanded to the trial court with directions to conduct a diversion eligibility hearing under section 1001.36 within 90 days from the remittitur. If the trial court determines that defendant is eligible for diversion, the court should grant diversion and, if the defendant successfully completes diversion, the charge should be dismissed. If, however, the trial court concludes that defendant is not eligible for diversion or defendant fails to complete diversion, his conviction and sentence shall be reinstated.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

KIM. J.

We concur:

MOOR, Acting P. J.

JASKOL, J.*

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* Judge of the Los Angeles County Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.